

8.40 TRESPASS TO REAL PROPERTY (pre-1984)

A. General

The measure of damages to be awarded to a plaintiff entitled to a verdict is the difference between the fair market value of his/her property before and after the trespass by the defendant.

If you find that the defendant was in wrongful possession of the property, the damages should include also the profits or earnings, that is, the monetary advantage or income, which derived from the occupation of land during such period of wrongful possession.

Cases:

Huber v. Serpico, 71 N.J. Super. 329, (App. Div. 1962); *Barberi v. Bochinsky*, 43 N.J. Super. 186 (App. Div. 1956); *Manda v. Orange*, 77 N.J.L. 285 (Sup. Ct. 1909). See also *Harper & James, Torts*, §1.8- 1.10; *Dime Sav. Bank of Brooklyn v. Altman*, 275 N.Y. 62, 9 N.E.2d 778 (Ct. App. 1937).

The cost of repair is a proper element to consider in ascertaining the diminution in value resulting from a tortious injury to real property. *Rempfer v. Deerfield Packing Corp.*, 4 N.J. 135 (1950).

B. Special Value

If the trespasser to land destroyed shade or ornamental trees or shrubbery having special value to the landowner, the measure of damages is the fair and reasonable cost of restoring the land to a reasonable approximation of its former condition, without necessary limitation to the diminution in the market value of the land.

Cases:

Huber v. Serpico, 71 N.J. Super. 329 (App. Div. 1962); *see also Restatement, Tort*, §929, Comment (b).

C. Growing Crops

If the trespasser has destroyed crops not yet severed from the land, the measure of damages is the probable fair market value of the crops, if they had ripened and been brought to market, minus the reasonable cost of cultivation, harvesting and marketing.

Cases:

Deverman v. Stevens Builders, 31 N.J. Super. 347 (App. Div. 1954). *See also United States v. 576.734 Acres of Land, etc.*, 143 F.2d 408 (3rd Cir. 1944).

D. Trespassing Structures (Encroachments)

If a trespasser erects a structure (encroachment) which the landowner has a right to remove, the landowner as plaintiff may recover the cost of removal of that structure (encroachment) but not in excess of the diminution in fair market value of the land resulting from the structure (encroachment).

Cases:

Rempfer v. Deerfield Packing Corp., 4 N.J. 135 (1950); *Barberi v. Bochinsky*, 43 N.J. Super. 186 (App. Div. 1956). See also *Restatement, Torts*, 929, Comment (d).

The general rule setting the diminution of value as the upper limit of recovery is in harmony with the earlier cases. See *Bates v. Warrick*, 77 N.J.L. 387 (Sup. Ct. 1909). The exception to this general rule is found in the "special value" rule. See *Huber v. Serpico*, 71 N.J. Super. 329 (App. Div. 1962).

E. Action by One with Less Than Sole Possessory Interest

Any person having a possessory interest in the land may recover against a trespasser the full measure of damages for the wrong, holding such fund as constructive trustee for others having a possessory interest.

NOTE TO JUDGE

Both mortgagor and mortgagee have a cause of action against a trespasser causing damage to the mortgaged premises; the mortgagor being entitled to recover the damage caused to the estate; the mortgagee for the diminution of the value of the security. Recovery by either mortgagor or mortgagee bars suit by the other against the trespasser. *Garrow v. Brooks*, 123 N.J. Eq. 138 (Ch. 1938), *Elvins v. Del. & Atl. Tel. Co.*, 63 N.J.L. 243 (E. & A. 1899), *Schalk v. Kingsley*, 42 N.J.L. 32 (Sup. Ct. 1880). As to Landlord-Tenant see *Todd v. Jackson*, 26 N.J.L. 525 (E. & A. 1857).

F. Punitive Damages (Approved 1/97)

[The trial judge should charge either Model Civil Charge 8.60 or 8.61 depending on when cause of action was filed.]